Why the EU Commission and the Polish Supreme Court Should not Withdraw their Cases from Luxembourg

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Amendment to the Supreme Court Act

On 21 November 2018 the Sejm passed an act amending the Supreme Court (SC) Act. The amendment reinstated the previous retirement age for judges who performed their duties prior to the entry into force of the SC Act of 8 December 2017 (i.e. 70 years of age). Consequently, SC judges who retired in accordance with the SC Act are reinstated to perform his or her function on the position previously held on the day of the adoption of the SC Act.

Some politicians of the Law and Justice claim that the amendment, once finally signed by the President of Poland, causes the Commission action before the Court of Justice (CJEU) to become groundless insofar as to the objections to the retirement of judges (see Case no. C-619/18).

In our opinion, there are at least several reasons against the withdrawal of Commission's action alleging the violation of Treaties from the CJEU.

The CJEU may still pass judgments

There is no doubt that the CJEU may still pass a judgment in this case. The violation of EU law by a Member State will be assessed based on the legal status as at the lapse of the time limit specified for Poland by the Commission in a reasoned opinion. In view of the case law, it will not be possible for the CJEU to consider any further amendments (see e.g. Case no. C-389/09). In the case of the SC Act, the time limit specified in the reasoned opinion lapsed in mid-September 2018, when the provisions concerning the retirement of judges were applicable.

Why should the action not be withdrawn?

Firstly, the CJEU case law indicates correctly that even if the default has been remedied after the time-limit prescribed by that opinion, pursuit of the action still has an object. That object may consist in particular in establishing the basis of the liability that a Member State could incur towards those who acquire rights as a result of its default (see e.g. Case no. C-168/03). This may concern judges who intend to seek compensation for the conduct of authorities in respect of their retirement.

Secondly, while the act amending the SC Act is correct in terms of its effect (judges can once again pass judgments), it presumes the retirement of judges on the grounds of existing provisions of law (Art. 2 sec. 1 of the Act). This is not altered by a provision stipulating that the performance of the judges' duties is deemed to have been uninterrupted (Art. 2 sec. 1, last sentence), since the subsequent provision provides for the possibility of "remaining retired" (Art. 2 sec. 2). The judgment of the CJEU could ultimately determine whether regulating the retirement of SC judges aged 65 or older violated the principle of irremovability of judges. Should this be the case, the SC judgment would be a declaratory document, meaning that the retirement provisions have been inapplicable since their entry into force and that SC judges have not effectively retired under these provisions (irrespective of the security and the amendment to the SC Act). In accordance with the principle of primacy, the provisions of domestic law that are in conflict with EU law are automatically ineffective upon their entry into force (see Case no. C-409/06).

Thirdly, an SC judgment stating that the provisions questioned by the Commission violated EU law would discredit the Polish Government's argument that the amendment was introduced solely for the purpose of adjusting to *inaudita altera parte* provisional measures adopted by the CJEU. At this stage it is not clear whether the CJEU decides to uphold these measures in its final ruling. The completion of proceedings pending before the CJEU would guarantee, if successful, that the changes introduced by the last amendment are permanent. As we know all too well, an act can be passed in several of days and the same is true for passing an amendment. In such case, the Commission would have to conduct the entire proceedings anew. The CJEU judgment would give a clear answer as to whether the approach of the Polish legislator was appropriate. Should the proceedings end in favour of the Commission, this would be the first authoritative statement of the CJEU confirming the violation of an element of the rule of law in Poland. It should also be borne in mind that the judgment would apply *erga omnes*.

Fourthly, the passing of a judgment by the CJEU is in the best interest of the EU itself, for the ruling would undoubtedly confirm that the Commission (and the CJEU itself) are competent to assess the status of the rule of law in Member States, including the extent to which judicial independence is being observed in these states. So far, the CJEU has only passed a preliminary ruling in this respect, in the *Associação Sindical dos Juízes Portugueses* case (C-64/16). A judgment in this case would also prove that the Commission was right in accusing Poland of violation of Art. 19 of the Treaty on European Union in conjunction with Art. 47 of the Charter of Fundamental Rights of the European Union, and not the anti-discrimination directive, as it did in 2012 in the case of Hungary. As we all remember, the judgment of the CJEU proved to be ineffective in the said case.

What about SC's questions referred for a preliminary ruling?

The act amending the SC Act provides for an obligation to discontinue pending proceedings before the SC: appeals against negative opinions issued by the

National Chamber of the Judiciary in proceedings conducted under Art. 37 § 1 and Art. 111 § 1–1b of the SC (Art. 4 sec. 1) and in cases regarding the establishment of existence of a service relationship (Art. 4 sec. 2). In some cases of this nature, the SC referred questions to the CJEU for preliminary ruling regarding, among other things, the issue of the lawfulness of retirement of SC judges, the status of the National Council of the Judiciary and the status of the Supreme Court's Disciplinary Chamber under EU law. The discontinuation of the proceedings would require the questions referred for preliminary ruling to be withdrawn.

In our opinion, such an obligation to discontinue proceedings violates the provisions of EU law and, therefore, the SC should refuse the application of a provision that gives rise to an obligation to discontinue proceedings.

Firstly, all these cases contain an EU element (namely the principle of effective judicial protection – Art. 19 of the TEU and Art. 47 of the Charter). There is, therefore, a suspicion that the obligatory discontinuation of pending proceedings makes it impossible to receive judicial protection for powers arising under EU law (e.g. by a judge who demands his or her status to be established in terms of retirement). As set out above, the act may be interpreted in such a way to establish grounds for effective retirement of SC judges. However, EU law may stand in the way of the legislator's view. Hence, the obligatory discontinuation of proceedings makes it impossible to establish the status of the judge under EU law and to assess the act amending the SC Act. This constitutes a violation of the principle of effectiveness limiting the procedural autonomy of a Member State. Such provisions should not be applied by a domestic court due to the principle of primacy.

Secondly, potential discontinuation of proceedings would make it impossible for a domestic court to contact the CJEU through the preliminary ruling procedure, if the domestic court found that the CJEU's interpretation is required to pass a final judgment in a case at hand. The CJEU finds such limitation to be one of the most serious violations of EU law. Any provisions of domestic law and administrative, court and legislative practice that allow for referring questions to the CJEU for preliminary ruling are repealed on the grounds of the principle of primacy of EU law. According to the CJEU, "the existence of a domestic procedural provision cannot lead to questioning the authority to request the CJEU to pass a preliminary ruling by domestic courts" (see e.g. Case no. C396/09).

Thirdly, the discontinuation of pending proceedings requires a procedural decision of a domestic court. Under EU law, in cases with an EU feature, a ruling in this respect must be passed by a court that meets the standards of the principle of effective judicial protection. In theory, retirement cases should be settled by the Supreme Court's Disciplinary Chamber. However, for example, in declaratory judgment actions (examined by the Labour Law and Social Security Chamber of the SC) a question was posed of whether the Disciplinary Chamber is even able to settle this issue due to EU standards regarding the principle of effective judicial protection. Hence, the prejudicial question has yet to clarify who should make any procedural decisions in this case, including the decision to discontinue the proceedings. It arises at this point that even prior to the discontinuation, there is a need to establish the legal status under EU law. This, however, requires a response of the CJEU.

Finally, there is a question of a more general nature. Pursuant to Art. 4 sec. 2 of the SC Act, proceedings that are discontinued concern judges who retired under the amendment. If, however, under EU law, the retirement provisions violated EU law, hence they were inapplicable, the judges never retired in the first place. Therefore, the discontinuation provision of the amendment is not applicable in this respect. This is yet another proof that we need to wait for answers from Luxembourg.
